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No. 99-959

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,

Petitioners,

v.

WILLIAM J. CLINTON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

MARK D. ROTH
General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6415

MARTIN R. COHEN *
Assistant General Counsel for Litigation
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
Suite 117
10 Presidential Blvd.
Bala Cynwyd, PA 19004
(610) 660-0316

Counsel for Petitioners

* Counsel of Record

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. The Government Has Not Meaningfully Responded to the Petitioner's Basic Assertion That the Sixth Circuit Misconstrued *Lujan* Because It, Like the District Court, Required Proof at the Pleading Stage of the Components of Constitutional Standing.

Under the matrix set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), at the pleading stage of a proceeding, with no discovery allowed and with no administrative record made available to them or filed with the court, the plaintiffs should not be expected (as they were here by the Sixth Circuit) either to allege or to prove the detailed facts that ultimately will have to be proved to establish constitutional standing at a later stage of the proceeding. ("At the pleading stage 'general

factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that the general allegations embrace those specific facts that are necessary to support the claim.' ") Contrary to the government's hyperbolic and inaccurate reference to a "tortuous trail of speculation and surmise," see p. 7 of the government's response, the plaintiffs did allege injuries that are appropriately specific, concrete and easily comprehended. For example, two of the plaintiffs who had worked at the Newark AFB were prepared to follow the Newark workload to any depot which received that workload under the provisions of the agency's Priority Placement Program. Certainly at the pleading stage it must be accepted as established that such a program ensures that a Department of Defense employee who has been discharged because his or her workload is being transferred, can follow that workload to its new location. Since 10 U.S.C. Section 2464 required that the Newark workload be so transferred, it was well beyond the requirements of *Lujan* at the pleading stage to require that those plaintiffs be able to specify which federal depot should have received that workload and/or that they had made concrete plans to move to that specific location. Such a detailed prediction and proof of future events is not required at the pleading stage under *Lujan* or under a more recent implementation of the *Lujan* ruling by the Court in *Bennett v. Spears,* 520 U.S. 154, 168 (1997).

II. Not Only Did the Sixth Circuit Misconstrue the Proof Matrix in *Lujan* in This Specific Case, But Contrary to the Assertions of the Government in Its Response to the Petition, the Sixth Circuit's Error Has Created a Misguided Precedent That Will Spawn Unnecessary Future Litigation in the Federal Courts.

The government in its response mistakenly suggests that because Congress adopted 10 U.S.C. Section 2469a after this case was initiated the constitutional standing issue in

this case is no longer of any relevance. This case was primarily brought to enforce 10 U.S.C. Section 2464, which despite some minor amendments since the commencement of this lawsuit, see pages 43a to 47a of Appendix E to the Petition for a Writ of Certiorari, contains today the same type of limitations on the Secretary of Defense's discretion with regard to the performance of core logistics work as it did at the time of the filing of the instant lawsuit. Massive amounts of core logistics workload, i.e., 10 U.S.C. Section 2464 workload, is still performed by the Department of Defense. Hence the constitutional standing issue regarding these types of illegal privatization lawsuits is far from being moot.[1] In addition the same type of standing issues will exist regarding any alleged illegal privatization of "inherently governmental workload" that is now performed by agencies other than the Department of Defense. Finally, as explained more fully in the opening brief in support of this Petition, the proper understanding of the precepts of *Lujan* regarding the evaluation of pleadings when a motion to dismiss has been filed is a commonly encountered problem in federal court litigation in many different substantive areas.

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1 Whenever core workload is illegally not transferred to a surviving Department of Defense facility or is not subjected to an OMB Circular A 76 public private competition, affected federal employees will be able to make the same type of allegations regarding their injuries as those made in the instant matter.

III. The Government Has Ignored the Fact That the Fortuitous Availability of Directly Incriminating Evidence to the Plaintiffs in the Seventh Circuit Case Was Misconstrued by the Sixth Circuit in the Instant Case as Creating a Requirement That Such Evidence Be Available and Pled By the Similarly Situated Plaintiffs in Its Case in Order to Withstand a Motion to Dismiss, and That Misunderstanding Has Created a Conflict Between the Two Circuits.

The plaintiffs in *American Federation of Government Employees v. Cohen*, 171 F.3d 460, 466 (7th Cir. 1999) had somehow obtained and presented to the court a management document that explicitly admitted that the jobs at the closed Detroit facility should have been transferred to the Rock Island arsenal where the plaintiffs were about to be laid off because of lack of work. It is inconsistent with Article III of the Constitution and *Lujan* and another decision of this Court to conclude (as the Sixth Circuit did in its decision here and the government did in its response to the instant petition) that to survive a motion to dismiss a plaintiff must be able to come up with this type of conclusive proof which connects the illegality of the defendants' actions with the specific injury soon to be suffered by the plaintiffs. The Seventh Circuit, although it recognized the probative value of that evidence, did not base its finding of constitutional standing on the proof that had been gratuitously submitted at the pleading stage. The Sixth Circuit misconstrued *Lujan* and the decision of the Seventh Circuit in *Cohen* in demanding this type of proof at the pleading stage that was fortuitously available (but was not central to the holding in favor of the plaintiffs) in *Cohen*.

IV. Contrary to the Assertion of the Government in Its Response to the Petition the Core Logistics Workload Here, as Defined By 10 U.S.C. Section 2464, Is Highly Similarly to the Arsenal Act Workload That Was Defined By the Arsenal Act in the Seventh Circuit Case in That in Both Cases Congress Expressed a Strong Interest That the Work Be Performed in House By Federal Employees for Military Readiness Purposes, and Just as the Federal Employee Plaintiffs There Were Found to Have Prudential Standing Because They Were in the "Zone of Interest" of the Arsenal Act, So Likewise Would the Plaintiffs Here Be Found to Have Prudential Standing Because They Are in the "Zone of Interest" of Section 2464.

The Sixth Circuit failed to reach the prudential standing issue which had been decided by the district court adverse to the plaintiff. Because the core logistics work here is similar to the arsenal act work in *American Federation of Government Employees v. Cohen, supra,* in that Congress explicitly indicated its interest in having both workloads performed by federal employees for military readiness reasons, there are clearly powerful reasons here to find that the plaintiffs have prudential standing under 10 U.S.C. Section 2464, just as the Seventh Circuit in *Cohen* found that the plaintiffs there had prudential standing under the Arsenal Act. *Id.* 473-475.

V. In Crafting 10 U.S.C. Section 2464 Congress Intentionally Placed Very Limited Restraints on the Secretary of Defense in His Performance of Core Logistics Workload, However, Those Carefully Chosen and Limited Restraints Should Be Enforceable in Court.

The government misunderstands the effect of the instant lawsuit. Enforcing the carefully crafted and very limited Congressional requirements placed on the Secretary of Defense in performing core logistics work is not a matter of "second guessing the national security and military readiness decisions of the Secretary of Defense," see

government's response at age 11, but rather of making sure that Congress' reasonable directive to the executive branch with regard to Congress' constitutional duty "[t]o raise and support Armies" will be followed. See Article I, Section 8, cl. 12 of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK D. ROTH
General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6415

MARTIN R. COHEN *
Assistant General Counsel for Litigation
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
Suite 117
10 Presidential Blvd.
Bala Cynwyd, PA 19004
(610) 660-0316

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